Quality Building Contractors, Inc. *and* Bricklayers and Allied Craftworkers, Local No. 1, New York, B.A.C.I.U., AFL–CIO. Case 29–CA–25646

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

Pursuant to a charge filed by Bricklayers and Allied Craftworkers, Local No. 1, New York, B.A.C.I.U., AFL–CIO (the Union), on June 9, 2003, the General Counsel of the National Labor Relations Board issued a complaint on September 3, 2003, alleging that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to provide information requested by the Union. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On October 27, 2003, the General Counsel filed a Motion for Summary Judgment and Motion to Strike Portions of Respondent's Answer. On October 29, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response on November 18, 2003.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint alleges that since on or about April 4, 2003, the Respondent has failed and refused to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. The requested information pertained to a worksite different from the site at which the Respondent initially employed union members pursuant to the parties' collective-bargaining agreement signed in 2002. The Respondent denies that it has a duty to provide this information and denies that the information is necessary and relevant to the Union's duties. We disagree. First, for the reasons set forth below, we find that the Respondent's obligation to provide this information is definitively resolved by our finding on the threshold issue—i.e., that the collective-bargaining agreement entered into between the Respondent and the Union by its terms, was unambiguously multisite in scope.[1] Second, for the reasons set forth below, we further find that there are no factual issues warranting a hearing in this matter and that the Respondent's affirmative defenses are inadequate to defeat the Motion for Summary Judgment.

The Respondent is a general contractor engaged in the construction industry in and around New York City. In September 2002, the Respondent was awarded a contract to perform work at the Essex House in Manhattan. That contract required the Respondent to employ union labor. As a consequence of the Essex House contract, the Respondent executed a collective-bargaining agreement with the Union on October 4, 2002, which agreement was effective, by its terms, from July 1, 2000, through June 30, 2004.[2]

The 2000–2004 agreement contains several interrelated clauses that together establish its scope. The "Scope of Work" clause, article IV, describes the type of work covered and includes the pointing, cleaning, and caulking work at issue in this case. The "Geographical Jurisdiction" clause, article V, provides that the agreement shall apply to all covered work within the Union's jurisdiction, which includes the five counties of New York City and Nassau and Suffolk counties. The "Union Recognition" clause, article VI, provides that the Respondent recognizes the Union as the exclusive collective-bargaining agent for its employees on all present and future jobsites within the Union's jurisdiction.

Additionally, the collective-bargaining agreement contains a provision restricting the Respondent's authority to subcontract bargaining unit work. The "Other Contracts" clause, article XX, section 4(b), provides that "[t]he Employer must not subcontract bargaining unit work unless the subcontractor receiving the subcontract has an agreement with the Union."

In late 2002 or early 2003,[3] the Respondent began working at Park City Estates, in Rego Park, New York, where the Respondent was performing pointing, cleaning, and caulking work (PCC work). During March 2003,[4] the Union became aware that the Respondent was employing individuals to perform PCC work at the Park

[1] Chairman Battista agrees that the requested information is relevant to a grievance alleging that the contract between the Respondent and the Union covered multiple sites. However, Chairman Battista does not pass on the merits of that grievance. In 8(a)(5) "informational" cases, the issue is whether the requested information is relevant to the processing of the grievance, not whether the grievance has merit. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437–438 (1967).

[2] The 2000–2004 collective-bargaining agreement was negotiated by the International Union and the Building Restoration Contractors Association.

[3] The Respondent argues that it began work on the Park City Estates Project in September 2002, while the General Counsel contends the Respondent began the work in March 2003. This factual dispute over the timing of events is not material in light of our conclusion below that the agreement clearly covers all preexisting projects.

[4] All dates refer to 2003, unless otherwise indicated.

City site who were not union members. On March 11, Michael Barbera, a union representative, called Larry Schwartz, Respondent's owner, and requested that, pursuant to the union-security clause in the parties' collective-bargaining agreement, the Respondent require employees performing PCC work at Park City to join the Union or terminate them. Schwartz did not comply with this request.

About April 4, the Union's attorney informed the Respondent by letter that the Union was filing a grievance because the Respondent was performing PCC work covered by the collective-bargaining agreement at the Park City site with employees who were not members of the Union. In order to process the grievance, the Union requested the following information: (1) the contract for the Park City project; (2) timesheets for all employees on the Park City project; and (3) all requests for payment submitted to the customer/building owner for the Park City project.

About June 4, the Respondent replied, stating that "the Agreement between [Respondent] and Park City Estates was signed prior to our signing an Agreement with PCC Local Union 1. Therefore, [Respondent disputes] the necessity for any union employees to be on the job."

As stated above, the General Counsel contends that the Respondent's failure to provide the information violates Section 8(a)(5) of the Act because the information is relevant to the Union's representational duties. Specifically, the General Counsel asserts that the requested information is relevant to the Union's claim that the Respondent breached its obligation under the 2000–2004 collective-bargaining agreement to hire union members for the Park City job, which job is encompassed by that agreement's geographical jurisdiction. The Respondent contends that it has no duty to provide the information because its collective-bargaining agreement with the Union covers only the Essex House project and the information requested pertains to Park City, which is not covered by that agreement.

First, we reject the Respondent's claim that the parties' collective-bargaining agreement was restricted to the Essex House project. By its literal terms, the 2000–2004 agreement clearly covers the Park City job as well. The agreement provides that its terms shall apply to all pointing, cleaning, and caulking work performed within a seven county area. The Park City Estates Project is located within that geographic area.

Notwithstanding the unambiguous language of the 2000–2004 agreement, the Respondent attempts to contradict its clear terms by pointing to extrinsic evidence. Specifically, the Respondent, citing the Union's statements in October, November, and December 2002, argues that the parties intended the agreement to cover only the Essex House project. The Respondent contends that Union agents told the Respondent's representatives, both before and after they signed the 2000–2004 agreement**,** that the agreement covered only the Essex House project and that it established only an 8(f) relationship. The Respondent further asserts that "[i]t was also understood and represented that the CBA would not apply to any of [the Respondent's] then pre-existing, ongoing projects."

The Respondent further contends that after it began performing work on the Park City project, the Union asked the Respondent to "get off on the right foot" with the Union and to show its "good faith" in their relationship by hiring some union members on the Park City project. Again, the Respondent alleges that the Union told it that the collective-bargaining agreement did not cover the Park City project. In January 2003, the Respondent hired two union members to work at the Park City project.

We find that notwithstanding the Respondent's contention that, when signing the 2000–2004 agreement and thereafter, the Union advised the Respondent that the collective-bargaining agreement was an 8(f) prehire agreement that would be applicable to the Essex House job only, the contract by its clear and unambiguous terms states that it was not so limited.[5] In these circumstances, Board precedent prohibits the use of parol evidence to vary the unambiguous terms of a collective-bargaining agreement. See *NDK Corp.*, 278 NLRB 1035 (1986) ("National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective-bargaining agreement valid on its face."). As the Ninth Circuit stated, "Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant." *NLRB v. Electrical Workers Local 11*, 772 F.2d 571, 575 (9th Cir. 1985). See also *America Piles, Inc.*, 333 NLRB 1118 (2001) (where agreement clearly required employer to adopt master agreement covering multiple locations, parol evi-

[5] The Respondent argues that it had no duty to provide the requested information because it had only an 8(f) relationship with the Union. An employer's duty to provide relevant information exists in the 8(f) context as well as in the 9(a) context, with minor differences not relevant here. *Diversified Bank Installations*, 324 NLRB 457, 468 (1997) ("The statutory duty to provide information 'is equally applicable during the term of an 8(f) agreement.'"); *Gary's Electrical Service Co.*, 326 NLRB 1136, 1136 (1998) (finding that the employer violated Sec. 8(a)(5) by refusing to provide relevant information to an 8(f) union), enfd. 227 F.3d 646 (6th Cir. 2000). Therefore, the Board need not resolve whether the parties' relationship is governed by Sec. 9(a) or Sec. 8(f).

dence that employer intended to bind itself only on a single site is not considered). Accordingly, we conclude that, based on the four corners of the document, the 2000–2004 agreement is not limited to one project, but - by its own terms—covers all existing and future jobs.

Our finding that the Respondent's agreement with the Union was not restricted to one project bears on the question of the relevancy of the information requested by the Union. That request—concerning the Park City job—pertained to work performed by the Respondent within the geographical scope of the collective-bargaining agreement. As such, the Union was entitled to the information. "When a union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy." *Commonwealth Communications, Inc.*, 335 NLRB 765, 768 (2001), enf. denied on other grounds, 312 F.3d 465 (D.C. Cir. 2002). Where information requested relates to matters outside the unit that might have a bearing on the employment terms and conditions of the unit employees, the burden is on the General Counsel to prove relevancy in order to establish a violation on the basis of the employer's failure to furnish the requested information. Id., and cases there cited. Whether or not the presumption applies, we apply a "liberal, discovery-type standard" in determining relevancy. Id. (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)).

Here the Union requested information relevant to the grievance it filed. The Union sought the contract for the Park City job, timesheets for employees working on the job, and requests from the Respondent to be paid. The timesheets for employees working on the Park City job are presumptively relevant. This information pertains directly to the wages and hours of employees performing bargaining unit work at the Park City site. Refusal to provide such information "constitutes in most instances a per se violation of the duty to bargain in good faith." *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir. 1977).

The contract for the Park City job and the Respondent's requests to be paid for this job are arguably relevant. See, e.g., *Pertec Computer*, 284 NLRB 810, 822–23 (1987) (union entitled to subcontract to ascertain whether employer violated a clause in the parties' collective-bargaining agreement prohibiting subcontracts), decision supplemented 298 NLRB 609 (1990), enfd. in relevant part 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991).

When making requests for information that is not presumptively relevant, the Union must state why the information is relevant. See *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997); *Island Creek Coal Co.*, 292 NLRB 480, 490 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990). In this case, in its written information request, the Union stated: "This information is necessary in order to determine the amount of lost wages and benefits that should have been paid to [Union] members from the time the pointing, cleaning and caulking work began to date." Thus, the Union articulated why the contract for the Park City job and the Respondent's requests to be paid were relevant under the Board's liberal standard for relevance. *Commonwealth Communications*, supra (where project fell within contract's scope, employer required to provide information regarding that project).

The Respondent has raised several affirmative defenses to the allegation that it unlawfully refused to furnish the requested information. We reject each of these defenses. First, the Respondent argues that Section 10(b) bars the complaint. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Union learned in October 2002 that the Respondent was arguably violating the agreement by using nonunion labor. The Union requested the information in a letter dated April 4, which set forth its grievance. Two months later, on June 4, the Respondent replied, by letter, stating that the agreement did not cover the Park City project. The letter did not address the Union's request for information. The Union filed its charge on June 9. The Respondent argues that the 10(b) period began to run in October 2002, when the Union learned that the Respondent was using nonunion labor on the Park City Estates Project. The General Counsel argues that the 10(b) period began to run from June 4, the date that the Respondent replied to the Union's letter containing its information request. The Board made clear in *Oliver Insulating Co.*, 309 NLRB 725 (1992), enfd. 995 F.2d 1067 (6th Cir. 1993), that the 10(b) period begins to run when an employer clearly and unequivocally denies a union's information request, and not when the union learns of the underlying breach of contract that prompted its grievance.[6] Therefore, even assuming, arguendo, that the Respondent's June 4 letter

[6] See also *California Nurses Assn.*, 326 NLRB 1362, 1368 fn. 10 (1998) (10(b) requirement met where employer filed charge within 6 months of union's clear and unequivocal denial of its information request); *Commercial Property Services*, 304 NLRB 134, 143 (1991) (Sec. 10(b) satisfied where union filed charge within 6 months from date of its request and employer's denial).

constituted an unequivocal refusal to provide the requested information, the Union filed its charge well within the 10(b) period.

We likewise reject the Respondent's argument that the Union waived its right to obtain relevant information. A union can relinquish its statutory right to information only through a "clear and unmistakable" waiver. *New Jersey Bell Telephone, Co.*, 289 NLRB 318, 330 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989). The Respondent contends that the Union "clearly and unmistakably" waived its right to the requested information by refusing to challenge the Respondent's use of nonunion labor for over 6 months. In *CEC, Inc.*, 337 NLRB 516 (2002), the Board, adopting a judge's opinion, held that a union did not waive its right to information about an alleged alter ego of the respondent even though the union had known of the alter ego's existence for several years and had not filed a grievance. As in *CEC*, we find that the Union's inaction in this case did not amount to a "clear and unmistakable" waiver of its right to information.

The Respondent further contends that the Union waived its right to the requested information by allegedly making statements in October, November, and December 2002 that the agreement did not apply to the Park City Estates Project. As discussed above, we find that the clear unambiguous language of the contract shows that it was not confined to one location. There is no evidence that the parties entered into a new or supplemental agreement, oral or otherwise, that varied the clear and unambiguous terms of the contract signed by the parties. Cf. *Freezer Queen Foods*, 215 NLRB 638 (1974) (holding that parties can alter contract by subsequent agreement).

The Respondent's final waiver argument is that the Union "clearly and unmistakably" waived its information rights by agreeing with the Respondent to place two Union members on the Park City Estates Project. The Respondent cites no authority in support of this argument. We find that the Union's agreement to place two employees on the project did not signal a clear and unmistakable waiver of the Union's information rights.

Finally, the Respondent argues that the Union is not entitled to the requested information because the underlying grievance is in aid of an unlawful subject of bargaining. The Respondent notes that Section 8(f) authorizes a union and an employer to enter into a union-security agreement that requires employees to join the union after 7 days, but not earlier. The Respondent argues that the grievance contradicts Section 8(f) to the extent that the grievance challenges the Respondent's alleged breach of the union-security clause by failing to terminate nonmembers, some of whom may have been employed for fewer than 8 days. The Respondent's argument is specious. The Union has requested information relevant to a colorable grievance. Even though some nonmembers may have been employed fewer than 8 days, the grievance is not therefore "in aid of" an unlawful subject of bargaining, nor is the Respondent relieved of its statutory duty to furnish the information in question to the Union.

In sum, the requested information is relevant to the Union's performance of its statutory duties and the Respondent has failed to assert a successful affirmative defense, even assuming the truth of its factual assertions. There is no material factual dispute, and the General Counsel is entitled to judgment as a matter of law. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[7]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation with an office and place of business in Great Neck, New York, has been a general contractor engaged in performing masonry and exterior façade restoration work at construction jobsites in the New York metropolitan area.

During the 12-month period preceding issuance of the complaint, the Respondent purchased and received at its Great Neck facility goods and supplies valued in excess of $50,000 directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that Bricklayers and Allied Craftworkers, Local No. 1, New York, B.A.C.I.U., AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On April 4, 2003, the Union, by letter, requested the Respondent to furnish necessary and relevant information, and, since about the same date, the Respondent has failed and refused to do so. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[7] Because we have granted summary judgment we need not pass on the General Counsel's motion to strike portions of the Respondent's answer. See *FPA Medical Management, Inc.*, 324 NLRB 802, 802 fn. 2 (1997) enf. denied in part on other grounds 157 F.3d 909 (D.C. Cir. 1998); *Teledyne Economic Development*, 321 NLRB 58, 58 fn. 2 (1996), enfd. 108 F.3d 56 (4th Cir. 1997).

CONCLUSION OF LAW

By failing and refusing to furnish the Union, upon request in April 2003, the contract between the Respondent and the owner of the Park City Estates Project, any requests for payments made under that contract, and timesheets for all employees on the project, the Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in an unfair labor practice, we shall order that it cease and desist and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully failed and refused to furnish relevant and necessary information to the Union, we shall require the Respondent to furnish the Union with the contract between the Respondent and the owner of the Park City Estates Project, any requests for payments made under that contract, and timesheets for all employees on the Park City Estates Project.

ORDER

The National Labor Relations Board orders that the Respondent, Quality Building Contractors, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union, upon request in April 2003, the contract between the Respondent and the owner of the Park City Estates Project, any requests for payments made under that contract, and timesheets for all employees on the project; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Furnish the Union with the requested information set forth above.

(b) Within 14 days after service by the Region, post at its facility in Rego Park, New York, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since April 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide the Union, as it requested in April 2003, the contract between us and the owner of the Park City Estates Project, any requests for

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

payments made under that contract, and timesheets for all employees on the project; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL furnish the Union with the information requested as set forth above.

QUALITY BUILDING CONTRACTORS, INC.